U.S. Department
of Transportation
Federal Aviation Administration

SEP 28 2006

Marshall S. Filler, Esq.
Managing Director and General Counsel
Aeronautical Repair Station Association
121 North Henry Street
Alexandria, VA 22314-2903

Re: Request for Extension of Compliance Date

Dear Mr. Filler:

I have reviewed your request, dated September 22, 2006, for an additional extension of the compliance date for the drug and alcohol testing final rule clarifying subcontractor coverage. In addition, I received your letter of September 27, 2006, in which you referenced a survey that ARSA is currently conducting. Your extension request comes less than two weeks before the rule is set to take effect. I have also received a supporting letter, dated September 25, from the Regional Airline Association, the National Air Transportation Association, the Aviation Suppliers Association, the National Air Carrier Association, and Pratt & Whitney and Sikorsky. The September 25 letter merely reiterates several of the arguments you presented as support for the extension and offers no new information.

As you know, the subcontractor final rule was published on January 10, 2006, with an effective date of April 10, 2006 (71 FR 1666). The final rule provided clarifying language to the existing drug and alcohol regulations adding the parenthetical "including by subcontract at any tier" after the word "contract." The effect of this final rule is to clarify that employees who perform safety-sensitive functions by contract (including by subcontract at any tier) for a regulated employer must be tested, just as employees who perform the same functions directly for the employer must be tested. No other changes were contemplated by the final rule.

On April 5, 2006, we extended the compliance date of the final rule for 6 months, until October 10, 2006 because of concerns that "original equipment manufacturers (OEMs) and other entities may be confused regarding whether they are performing maintenance or preventive maintenance duties subject to testing or manufacturing duties not subject to testing." (71 FR 17000) We determined that the additional 6 months would provide "OEMs and others sufficient time to determine what work is subject to drug and alcohol testing." (71 FR 17000)

Your letter requests that the Federal Aviation Administration (FAA) extend the compliance date for this final rule for an additional 9 months. You assert that the FAA has failed to provide adequate guidance, leaving the rule "vague and ambiguous in material respects." As evidence of this ambiguity, you point to three requests for legal interpretation submitted to

the FAA's Office of the Chief Counsel over the past several months and to survey responses in which some portion of the individual respondents claim they are uncertain what tasks the FAA considers maintenance. The requests for legal interpretation relate primarily to a determination of whether specific work qualifies as maintenance or preventive maintenance, a matter not impacted by the final rule. In your September 27 submission you claim that several non-certificated maintenance sources (NCMS) have told your members that they will refuse aviation-related work rather than subject their employees to drug and alcohol testing. Finally, you assert that a nine-month delay in the compliance date will have no adverse effect on safety but that the loss of experienced NCMS could have precisely that effect.

After full consideration of your request, and for the reasons set forth below, I have decided to deny your request for extension.

Background

The FAA drug testing final rule was published in 1988 (53 FR 47024, November 14, 1988), and the FAA alcohol testing final rule was published in 1994 (59 FR 42911 August 19, 1994). Both regulations require employees who perform safety-sensitive functions directly or by contract for a regulated employer be subject to testing. Maintenance and preventive maintenance are among the safety-sensitive functions set forth in the FAA's testing regulations in 14 CFR part 121, appendices I and J.

While subcontractors have always been subject to testing under the regulations, early guidance appeared to have created some confusion as to whether all subcontractors performing maintenance, or only those subcontractors who took airworthiness responsibility for maintenance, would be subject to testing. By the mid-1990s, the FAA had clarified its position that a plain reading of the regulations did not support such a distinction. Since that time the agency has written numerous letters to individuals and companies clarifying that all subcontractors were subject to testing under the regulations.

In 2002, you wrote to the FAA to request that we resolve the issue of whether subcontractors who did not take airworthiness responsibility were subject to testing. While we believed this issue had already been resolved, we included the subcontractor clarifying language within a notice of proposed rulemaking (NPRM), published on February 28, 2002 (67 FR 9366).

During the course of the rulemaking, we consistently reiterated that we did not think there was much confusion about the issue, based on the more than 3,000 inspections of contractors that we had conducted since the inception of the testing program. These inspections revealed a broad understanding among the aviation community that the drug and alcohol rules applied to subcontractors (71 FR 17001).

In response to the NPRM, several commenters said that the proposed clarification would be costly and requested that we provide costs and benefits for this clarifying change. Your association, the Aeronautical Repair Station Association (ARSA), and Pratt & Whitney both suggested there was specific data to contradict our cost assumptions. We asked that this further information be submitted to the public docket. (See the FAA rulemaking docket

FAA-2002-11301, letters of December 24, 2002) The FAA determined the submitted information did not substantiate the voiced concerns.

On January 12, 2004, we published a final rule addressing all issues proposed in the NPRM, except for the subcontractor issue, which we reserved for a supplemental notice of proposed rulemaking (SNPRM). We published the SNPRM on May 17, 2004 (69 FR 27980), with a regulatory evaluation. We explained that we were offering another opportunity for the public to provide comments to substantiate the concerns expressed about the alleged economic burden this rulemaking would impose on the aviation industry. (69 FR 27981) After a review of the comments presented and a determination that they did not demonstrate a significant economic burden on the regulated air carriers or on the aviation industry, we issued the January 10, 2006 final rule.

Analysis of the Request for a Delayed Compliance Date

In requesting a delay to the compliance date for this final rule, you note that ARSA has submitted two requests for legal interpretation, the resolution of which you claim is needed before compliance with the final rule is merited. While I am not responding directly to those requests for legal interpretation here, I think it is useful to generally outline those requests since you have argued a lack of response leaves the subcontractor final rule ambiguous. The questions, in essence, are as follows:

(1) Does the FAA's position on maintenance fabrication affect compliance with 14 CFR 145, *Repair Stations*?

(2) Are rebuilding or alterations and certain repairs of entertainment systems maintenance?

(3) Is manufacturer testing of components to determine whether repairs are necessary considered maintenance?

(4) To what extent is cleaning considered maintenance?

(5) Are repair stations required to have paragraph A449 added to their operations specifications or is some alternative form of registration acceptable?

None of these questions raises new issues related to the January 2006 rule, and the first four are questions pertaining to the implementation of an entirely separate regulation. It would not be reasonable to assert that all possible questions about maintenance must be answered to the satisfaction of all regulated parties before the FAA may require compliance by subcontractors with its drug and alcohol rules.

The fifth question does pertain to the FAA's drug and alcohol rules, but concerns provisions that relieve, rather than create, burdens for regulated parties. Under the FAA's drug and alcohol testing regulations, repair stations certificated under 14 CFR part 145 are not considered to be regulated employers, instead, they are contractors to regulated employers. Under 14 CFR part 121, appendix I, section IX, a repair station can have a paragraph added to its Operations Specifications to conduct drug and alcohol testing. Also under section IX, a contractor can obtain a registration, under which it may perform the same functions. Since there are certain factual situations where a repair station holds multiple certificates, has

multiple locations, or there are other factors demonstrating unique circumstances, it is sometimes more efficient for the repair station to obtain a registration instead of an Operations Specifications paragraph. Since all part 145 repair stations performing maintenance for a part 121 or 135 air carrier are, by definition, also contractors to the part 121 or part 135 carriers, either option should be available to them. We became aware of some of these unique situations after our 2004 final rule that added the Operations Specifications paragraph option for repair stations. We have continued to work with repair stations and other contractor companies that have come to us for advice on whether it is better to run their programs under an Operations Specifications paragraph or a registration. I do not believe our policy requires any change from existing practice, since it imposes no new restrictions; rather, it offers part 145 entities more flexibility. Accordingly, I have determined there is no need to extend the compliance date of the final rule because of this one issue.

As to the maintenance concerns that you have alluded to in your letter, I have determined that a delay in the compliance date would not address those concerns. By the same token, I am unpersuaded that questions regarding maintenance have introduced a level of ambiguity that would paralyze the industry if compliance with the subcontractor final rule is not delayed. The definitions of "maintenance" and "preventive maintenance" were issued in 14 CFR section 1.1 on May 15, 1962, and have remained unchanged. (27 FR 4588) At no time during the rulemaking did we change the definitions of maintenance or preventive maintenance, or any other safety-sensitive functions identified by the drug and alcohol testing regulations.

Carriers and repair stations have managed to determine whether a particular activity constitutes maintenance for over 40 years. They have also managed to determine whether the same activities require drug and alcohol testing for roughly 18 and 12 years, respectively. Nothing in the final rule changes that ability. Given the longstanding history of how the FAA and industry have defined maintenance, I do not believe the resolution of those questions is likely to substantially affect the manner in which the air carrier industry and its contractors operate.

As noted above, in letters dated July 18, 2006, and August 30, 2006 (months after the publication of the FAA's final rule with respect to subcontractor coverage under the drug and alcohol testing program), ARSA requested the FAA's Office of the Chief Counsel to interpret multiple maintenance issues. It is our understanding that the policy of the Office of the Chief Counsel is to respond to requests for legal interpretation within 120 days of when the FAA receives such requests if possible. The Office of the Chief Counsel has determined that this period of time is often needed to coordinate a response throughout the agency. While it is often possible to shorten the response time, many requests require the longer time frame because the issue raised is fact-specific and not specifically addressed by the applicable regulations. Questions regarding whether a particular activity constitutes maintenance generally fall within this category. I have been told that the Office of the Chief Counsel expects to be able to provide a response to both letters within 120 days of receipt.

While these responses will provide additional guidance, it is important to note that maintenance and preventive maintenance are areas that do not lend themselves to a bright-line test or a one-size-fits-all interpretation. Under the 1962 regulations, maintenance means "inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance." Preventive maintenance means "simple or minor preservation operations and the replacement of small standard parts not involving complex assembly operations." These definitions have worked very well. The definitions are meant to be broad and flexible and are not intended to be a "laundry list" of particular tasks. Each and every subtask comprising any of the elements set forth in the definition, in and of itself, is not necessarily maintenance or preventive maintenance. In the first instance, it is the role of the certificate holder (e.g., air carrier, repair station, or mechanic) to make a determination of whether a particular task or function is "maintenance." In cases where there may be doubt, the certificate holder typically works through the issue with the local FAA flight standards field office.

Aircraft and component maintenance manuals may contain various instructions that pertain to maintenance and servicing of aircraft (these can contain very detailed steps/subtasks), and not all of these instructions are considered maintenance. For example, in your August 30 request for legal interpretation, you attached a page from the Weber Component Maintenance Manual that calls out specific instructions for dry cleaning seat covers. Included are instructions for cleaning a spot on a seat cover. The spot cleaning task does not meet any of the elements in the FAA's definition of maintenance, and the agency would not consider that task to be maintenance. The fact that in a given case an FAA inspector may require the certificate holder to prepare a maintenance release for either the spot cleaning or the entire cleaning of a seat cover does not make the task maintenance as a regulatory matter.

Additionally, in some instances an air carrier or repair station may consider a task to be a maintenance task when the FAA does not consider the task to be maintenance. This may be done for air carrier or repair station "internal" policy/procedural reasons. The FAA expects the certificate holder to determine what constitutes maintenance within the FAA's longstanding definition. The criteria, of course, are in the definition and, as a matter of law, the FAA would make the final determination. That determination would be subject to review in an appropriate legal forum if the certificate holder disagreed with the FAA's conclusion.

In any case, the determination of whether a particular task is maintenance is not impacted by the subcontractor final rule, and the subcontractor rule does not introduce any ambiguity in making determinations about maintenance. If a given task would be considered maintenance or preventive maintenance when performed by an employee of the air carrier, it remains maintenance or preventive maintenance when that task is contracted out. Outsourcing does not change the nature of the task.

You have also stated that the extension of the compliance date "should not prejudice the agency's goals for its envisioned drug and alcohol regime." We disagree. As you are aware, the drug and alcohol rules were implemented to assure aviation safety. Our safety

rationale for the rules is well-established. Pre-employment testing and random testing are necessary to assure that illegal drug-users or otherwise impaired individuals are not performing a safety-sensitive function.

The FAA is concerned that any further extension in the compliance date could send a signal that the agency is not committed to assuring that individuals who perform safety-sensitive functions are subject to drug and alcohol testing. Historically, the level of contractor compliance with the drug and alcohol testing has been fairly high, particularly since the FAA's efforts in the mid-1990s to make it clear that all contractors are subject to the rules. We are concerned that this compliance would be adversely impacted if regulated parties believed that they might later avoid coverage under the drug and alcohol rules – a logical interpretation of continuing delays of compliance dates. Since the entire genesis behind the drug and alcohol rules is to reduce the likelihood of individuals performing safety-sensitive tasks while using illegal drugs or alcohol, any reduction in compliance could adversely affect aviation safety.

As discussed in the SNPRM and in the final rule, the FAA's drug testing program continues to disclose instances of drug and alcohol abuse by safety-sensitive personnel, including individuals who conduct maintenance. In the first 11 years of drug testing, almost half of the 30,192 positive test results were attributable to maintenance workers. In the first 6 years of alcohol testing, almost half of the 876 alcohol violations were attributable to maintenance workers. (71 FR 1669, referencing 69 FR 27984) As we concluded then, the data shows that substance abuse in the maintenance population presents a safety concern sufficient to justify the final rule. (71 FR 1669) More recent data indicates that while maintenance personnel constitute approximately one-third of the population subject to drug and alcohol testing, they account for two-thirds of the positive drug tests. Additionally, the largest number of positive test results for maintenance employees has been in the pre-employment context, demonstrating that the pre-employment drug testing regulations have been successful in screening drug users out of safety-sensitive work. (71 FR 1669) The FAA believes it is necessary to the agency's safety mission to maintain this level of deterrence and detection of substance abuse by safety-sensitive workers throughout the aviation industry, regardless of the identity of their employers.

While you have alleged a high degree of confusion over various matters that are unrelated to the rule, neither you nor any other commenters to the various rulemaking documents have identified any significant adverse economic impacts to regulated parties. Nor have you shown, or is it reasonable, to believe that testing to ensure that safety-sensitive workers covered by the rule are not substance abusers could create irreparable harm to any employer. Further, you have made no showing that it is in the public interest to grant yet another extension request.

You have claimed that the results of your survey indicate that many NCMS will stop providing aviation-related services rather than submit their employees to drug and alcohol testing. The apparent concern is related to the costs of the rule. In the SNPRM the agency estimated that up to 300 non-certificated maintenance providers would develop drug and alcohol testing programs as a result of the final rule, at the cost of approximately $1,900 per

entity if that company employed 17 employees, we determined the economic impact of the subcontractor final rule was minimal. Nothing in you request for an extension of the compliance date or your September 27 submission leads the agency to believe that it was incorrect in that assessment.

The survey appears largely duplicative of a similar survey you conducted during the comment period for the SNPRM. As we explained in the regulatory evaluation supporting the subcontractor final rule, such surveys are inherently biased because it is sent to a targeted audience, i.e., members of your association. Additionally, the new survey allows respondents to remain anonymous, permitting multiple submissions. In any case, the FAA evaluated the possibility that there may be some companies who decide against providing aviation-related services because they do not wish to bear the cost of compliance. However, the FAA determined that businesses previously not subjecting their employees to testing would simply pass those costs on to the party with whom they contract. Your survey results provide no additional data to cause the agency to question its assessment. In any case, a delay in the compliance date would not address this potential concern.

Agency Determination

In summary, you have requested the additional 9-month extension, asserting that "many critical issues remain unresolved" and the resulting ambiguity is "causing paralysis for many industry members as they struggle to comply . . .with a rule that is still vague and ambiguous in material respects." In your letter you have said "the critical issues that remain to be resolved go to the very essence of the rulemaking and its implementation, such as which activities constitute maintenance and preventive maintenance." We disagree. Since the almost 45-year-old definitions of maintenance and preventive maintenance were not changed by the subcontractor clarification rulemaking, we do not believe that extending the compliance date for the subcontractor final rule would have any impact on how maintenance or preventive maintenance is understood by the industry. In addition, since the underlying FAA testing regulations established maintenance and preventive maintenance as safety-sensitive functions in 1988, it appears that the current request to delay implementation of the subcontractor final rule is not meritorious.

Therefore, for the reasons set forth above, I am denying your request for an extension of the subcontractor clarification compliance date as well as your request for a stay of the compliance date pending the outcome of your appeal of the subcontractor final rule before the United States Court of Appeals for the District of Columbia Circuit (Case Nos. 06-1091 and 06-1092).

Sincerely,

Nicholas A. Sabatini
Associate Administrator for Aviation Safety